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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

VERGIL BALAGOT,

Defendant and Appellant.

B233489

(Los Angeles County
Super. Ct. No. BA369113)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed as modified.

Boyce & Schaefer and Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Vergil Balagot, of firearm assault (Pen. Code,¹ § 245, subd. (a)(2)) and criminal threats (§ 422). The jury further found defendant personally used a firearm in the commission of the offenses. (§ 12022.5, subd. (a).) The trial court found defendant had sustained a prior serious felony conviction. (§ 667, subd. (a)(1).) Defendant was sentenced to 15 years in state prison. We modify the judgment and affirm.

II. THE EVIDENCE

A. The Prosecution Case

The victim, Liaquat Sulheri, owned a liquor store. The liquor store was down the street from a restaurant defendant's brother owned. Defendant stayed in the restaurant's storage room. Defendant had been in the liquor store twice previously to ask Mr. Sulheri for a cigarette. On March 15, 2010, at about 9:30 p.m., defendant attempted to exchange canned goods for a pack of cigarettes. Mr. Sulheri declined the offer and defendant left.

Defendant returned immediately and asked to exchange bottles of Tylenol and Motrin and a jar of makeup for cigarettes. He banged the bottles on the counter. Mr. Sulheri said, "Are you going to break my glass or what?" Defendant became angry and left.

Defendant returned a third time. He lifted his shirt, revealing a gun in his waistband. Defendant told Mr. Sulheri: "Motherfucker. Don't you ever, ever . . . shout . . . at me. . . . I have a gun. I have five bullets. So many time[s] I have gone to jail. I don't care." Mr. Sulheri had received firearms training as a member of the Pakistani military police. He thought the gun looked like a revolver. It had a curved brown

¹ All further statutory references are to the Penal Code unless otherwise noted.

wooden handle and a silver or white barrel with rust spots. Mr. Sulheri was afraid he would be shot. Mr. Sulheri lied and said he also had “protection.”

Defendant left but immediately returned a fourth time. He slammed his baseball cap on the counter and said: “I’m going to be waiting for you. I know you. You about to close.” Defendant left and walked in the direction of the restaurant where he stayed. However, he returned a fifth time. He walked back and forth outside the liquor store. Defendant pointed the gun at Mr. Sulheri. He walked by again, pointed his finger and said, “Watch out.” Mr. Sulheri called the police.

Martha Pixley assisted Mr. Sulheri at the liquor store. In return, Mr. Sulheri gave her food. Ms. Pixley saw a man enter the store around 9:30 p.m., go to the counter and talk to Mr. Sulheri. He turned as if to leave but then returned to the counter. He put his hand in his overcoat and said, “I’ve got a gun.” Mr. Sulheri said, “I have a gun as well.” Ms. Pixley did not see a gun.

Paul Tiguelo was playing Lotto at the liquor store. Mr. Tiguelo saw defendant walk into the liquor store and heard shouting. Defendant reached behind his back. Mr. Tiguelo saw the handle of a small gun in defendant’s waistband. The handle was curved and brown. It was similar to the handle of a .22-caliber revolver Mr. Tiguelo’s father had once owned. Mr. Tiguelo had last seen the gun approximately 21 years earlier. After defendant left, Mr. Tiguelo told Mr. Sulheri to call the police. Mr. Tiguelo then left the store, went to a telephone booth and attempted to call the police. Defendant approached, said something to Mr. Tiguelo, and then walked back towards the liquor store.

Officers Elias Villasenor and Arthur Castro arrived at the liquor store at 10:12 p.m. Mr. Sulheri described what had happened. Officers Villasenor and Castro located defendant in a parking lot. The parking lot was to the rear of defendant’s brother’s restaurant. Defendant did not resist. Officer Villasenor did not find a weapon on defendant’s person. No weapon was found in the restaurant parking lot or in the storage room where defendant lived. Mr. Sulheri, Ms. Pixley and Mr. Tiguelo all identified defendant as the person who had caused a disturbance in the liquor store that evening. Officer Castro testified a revolver typically has a curved wooden handle.

Thomas Pumphrey had lived with defendant in the storage room for about a year. Two weeks prior to the March 15, 2010 incident, defendant asked Mr. Pumphrey to buy a gun. Defendant said he knew someone who might sell him a .22-caliber gun for \$175, but the weapon had a problem and might not function properly. Mr. Pumphrey refused to help defendant acquire a gun. Mr. Pumphrey never saw defendant with a gun.

Shawn Khacherian was an electronic surveillance specialist and forensic video analyst. On March 16, 2010, he copied video camera surveillance footage from four motion-activated cameras in the liquor store. Mr. Khacherian testified the video was recorded at six frames per second. This compared to the 30 frames per second for normal television video. The images were, in his words, “[K]ind of choppy, broken up.” When played back, some events were not displayed on the video. The videotape was played for the jury. The jury also saw stills from the video surveillance film.

B. The Defense Case

Detective Emilio Garay spoke to Mr. Sulheri. Detective Garay said Mr. Sulheri and he watched the video together. On direct examination, the following testimony by Detective Balagot was presented: “Q He told you that [defendant] was threatening to kill him as he pointed and waved the gun in his direction; is that correct? [¶] A Correct.” Mr. Sulheri did not say anything about having a finger pointed at him. The parties stipulated to the items in defendant’s possession when he was booked. Those items were a wallet, a cellular telephone and a belt.

III. DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion In Disallowing Proffered Opinion Testimony

The information alleged and the jury found that defendant personally used a firearm within the meaning of sections 245, subdivision (a)(2) and 12022.5, subdivision (a). Section 245, subdivision (a)(2) defines the crime of assault with a firearm: “Any person who commits an assault . . . with a firearm . . . shall be punished.” Section 12022.5, subdivision (a), enhances the punishment for, “[A]ny person who personally uses a firearm in the commission of a felony” A “firearm” for purposes of sections 245, subdivision (a)(2) and 12022.5, subdivision (a) means, “[A]ny device[] designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion.” (§ 16520, subd. (a), formerly § 12001, subd. (b); *People v. Law* (2011) 195 Cal.App.4th 976, 983; *People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435.) A toy gun, pellet gun or BB gun does not qualify as a “firearm” within the meaning of sections 245, subdivision (a)(2) or 12022.5, subdivision (a). (*People v. Law, supra*, 195 Cal.App.4th at p. 983; *People v. Monjaras, supra*, 164 Cal.App.4th at p. 1435.)

Defendant sought to call Anthony Paul to testify that, “[T]he only way you know if it’s a real gun [is] to hold it and . . . test it because it could be a fake gun or a toy gun or a BB gun.” In a written motion, defendant argued: “Mr. Paul will testify that in order to verify that an object is truly a firearm as defined [in CALJIC No. 9.01], it has to be examined and/or discharged. . . . Mr. Paul will not be opining that the object in [d]efendant’s hand is not a firearm. . . . [¶] Mr. Paul will be generally testifying that in order to verify that the object in [d]efendant’s hand is truly a firearm, it has to be examined and/or discharged. The purpose of Mr. Paul’s testimony is to provide reasonable doubt as to whether the object in [d]efendant’s hand was truly a firearm.” The

trial court denied the request, but offered to allow Mr. Paul to testify in an Evidence Code section 402 hearing. Defense counsel never requested such a hearing.

Opinion testimony is admissible on subjects that are beyond common experience. (Evid. Code, § 801, subd. (a).) As our Supreme Court has held: “The proper scope of expert testimony is limited to subjects ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’ [Citations.]” (*People v. Gonzales* (2011) 51 Cal.4th 894, 931; see *People v. Lindberg* (2008) 45 Cal.4th 1, 45.) “[T]he pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury. [Citations.]” (*People v. Prince* (2007) 40 Cal.4th 1179, 1222; accord, *People v. Lindberg, supra*, 45 Cal.4th at p. 45.) Moreover, the Courts of Appeal have held, “Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. (*In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1121 [. . .] [, disapproved on another point in *People v. Brown* (1994) 8 Cal.4th 746, 763].)” (*People v. Torres* (1995) 33 Cal.App.4th 37, 45; accord, *People v. Chapple* (2006) 138 Cal.App.4th 540, 546-547.)

We review the trial court’s ruling for an abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 672; *People v. Guerra* (2006) 37 Cal.4th 1067, 1118 [whether particular subject was proper one for expert opinion].) We find no abuse of discretion. Whether defendant used a firearm for purposes of sections 245, subdivision (a)(2) and 12022.5, subdivision (a) is for the trier of fact to determine. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) The trier of fact may draw upon circumstantial evidence in deciding the question. (*People v. Law, supra*, 195 Cal.App.4th at p. 983; *People v. Monjaras, supra*, 164 Cal.App.4th at p. 1436; *People v. Green* (1985) 166 Cal.App.3d 514, 517.) Moreover, circumstantial evidence alone is sufficient. (*People v. Law, supra*, 195 Cal.App.4th at pp. 978-979; *People v. Monjaras, supra*, 164 Cal.App.4th at pages 1435-1438.) A jury may consider: witness testimony as to the object’s appearance; the witness’s experience with firearms; and the defendant’s conduct and words. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 12-13

[whether gun was loaded]; *People v. Aranda* (1965) 63 Cal.2d 518, 533, *People v. Monjaras*, *supra*, 164 Cal.App.4th at pp. 1435-1438.) But, as stated in *Monjaras*, a jury need not give a defendant the benefit of a witness's inability to say conclusively whether the weapon was real or not. (*People v. Monjaras*, *supra*, 164 Cal.App.4th. at p. 1436.) Moreover, in *Monjaras*, the Court of Appeal held: "[T]he victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm. [Citation.]" (*Id.* at pp. 1435-1438.) The trial court could reasonably conclude it was within the jury's common experience that the only way to conclusively prove a gun was real and not a toy was to examine it. Here, Mr. Paul never examined the alleged gun. Therefore, the trial court could reason opinion testimony was unnecessary. Further, the trial court could reasonably conclude that to permit the proffered testimony would mislead the jury. The trial court could reason Mr. Paul never examined the gun and his testimony was speculative. The proposed testimony would further suggest to the jury that a witness's inability to conclusively say the gun was real created a reasonable doubt as a matter of law. As the Court of Appeal held in *Monjaras*, that is not the law.

Even if the trial court abused its discretion, we would not find any prejudice to defendant. There was compelling evidence the firearm was real. Two weeks prior to the assault, defendant asked Mr. Pumphery to purchase a particular .22-caliber weapon. Defendant said the gun might have a problem and not function properly. Mr. Sulheri, who had received firearms training in the Pakistani military, saw a partly rusty revolver. Mr. Sulheri and Mr. Tiguelo both saw a curved, brown gun handle. That description was consistent with a typical revolver handle. It looked similar to a .22-caliber revolver Mr. Tiguelo's father had owned many years earlier. Defendant said he had a gun with five bullets in it. Defendant threatened to shoot Mr. Sulheri. He said he was not afraid to go to jail. It is not reasonably probable the verdict would have been more favorable to defendant had Mr. Paul been permitted to testify. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Fuiava*, *supra*, 53 Cal.4th at p. 671 [applying *Watson* standard to

claim of erroneous admission of evidence]; *People v. Scheid* (1997) 16 Cal.4th 1, 16 [same].)

Defendant argues the trial court's ruling deprived him of his Fifth Amendment due process right. He also asserts the ruling violated his Sixth Amendment right to present a defense. Because the trial court did not abuse its discretion in excluding the proffered testimony, defendant's federal constitutional claims also lack merit. (*People v. Fuiava, supra*, 53 Cal.4th at p. 666; *People v. Rodriguez, supra*, 20 Cal.4th at p. 10, fn. 2; *People v. Rundle* (2008) 43 Cal.4th 76, 133, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

B. Sentencing

1. Presentence Custody Credit

The trial court awarded defendant credit for 446 days in presentence custody (March 15, 2010, through June 3, 2011) and 446 days of conduct credit. However, because defendant was committed for two serious felonies (§ 1192.7, subds. (c)(31) & (c)(38)) and had a prior serious felony conviction, he was not entitled to "one for one" credit. (§§ 2933, subd. (e)(3) as amended by Stats. 2010, ch. 426, § 1; 4019, subd. (f) as amended by Stats. 2009, ch. 28, § 50, eff. Jan. 25, 2010.) The judgment must be modified to reflect 222 days of conduct credit.

2. Court Facilities Assessment

The trial court orally imposed a single \$30 court facilities assessment. (Gov. Code, § 70373, subd. (a)(1).) The assessment should have been imposed on each count for a total of \$60. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3; cf. *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866; see *People v. Alford* (2007) 42

Cal.4th 749, 758, fn. 6.) The oral pronouncement of judgment must be amended to so reflect. The abstract of judgment is correct in this regard.

3. Court Security Fee

The trial court imposed a \$30 court security fee (§ 1465.8, subd. (a)(1)) as to each count. However, because defendant was convicted on February 17, 2011, the correct amount was \$40. (Stats. 2010, ch. 720, § 33, eff. October 19, 2010.) The judgment must be amended to impose a \$40 court security fee as to each count for a total of \$80. The abstract of judgment must be amended to so reflect. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

IV. DISPOSITION

The judgment is modified to award defendant credit for 446 days in presentence custody plus 222 days of conduct credit for a total presentence custody credit of 668 days. The oral pronouncement of judgment is amended to impose \$60 in court facilities assessments (Gov. Code, § 70373, subd. (a)) and \$80 in court security fees (Pen. Code, § 1465.8, subd. (a)(1)). Upon remittitur issuance, the abstract of judgment must be amended to conform to the foregoing. The clerk of the superior court must deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.